STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 11, 2003
v	No. 243644 Saginaw Circuit Court
ROBERT JAY JACKSON, Defendant-Appellant.	LC No. 02-021048-FC

Before: Talbot, P.J., and Owens and Fort Hood, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count each of first-degree felony murder, MCL 750.316; conspiracy to commit armed robbery, MCL 750.529, MCL 750.157a; armed robbery, MCL 750.529; first-degree home invasion, MCL 750.110a(2); and possession of a firearm during the commission of a felony, MCL 750.227b.[1] The trial court sentenced defendant as a second-offense habitual offender, MCL 769.10, to life imprisonment for first-degree felony murder and thirty to sixty years' imprisonment for conspiracy to commit armed robbery. These sentences were to run consecutively to a mandatory two-year term of imprisonment for felony firearm. Defendant appeals as of right. We affirm.

Defendant contends that the trial court erred in denying his request for an involuntary manslaughter instruction. We review de novo a preserved claim of instructional error. In *People v McKinney*, 258 Mich App 157, 162; 670 NW2d 254 (2003).

In *People v Mendoza*, 468 Mich 527, 541; 544-545; 664 NW2d 685 (2003), our Supreme Court ruled that involuntary manslaughter is a necessarily included lesser offense of murder. Thus, if "a defendant is charged with murder, an instruction for involuntary manslaughter must be given if supported by a rational view of the evidence." *Id.* at 542. Here, defendant contends that his statement to the police was sufficient to support an involuntary manslaughter instruction.

[1] The trial court vacated defendant's armed robbery and home invasion convictions on double jeopardy grounds.

In that statement, defendant apparently claimed that he only had the gun for protection.[2] Defendant stated that the man who gave him the gun told him that the safety was on and that the gun was not loaded. Defendant stated that the gun either went off on its own or because of a "subconscious twitch." Finally, although in one part of his statement he claimed that the gun remained in his pocket, in another part of his statement he appeared to agree that it "probably was out."

We disagree with defendant's assertion that his statement provided evidence supporting an involuntary manslaughter instruction. Involuntary manslaughter has been repeatedly defined by our Supreme Court as: "the unintentional killing of another, without malice, during the commission of an unlawful act not amounting to a felony and not naturally tending to cause great bodily harm; or during the commission of some lawful act, negligently performed; or in the negligent omission to perform a legal duty." *Mendoza*, supra at 536.[3] Defendant was engaged in the commission of a felony, armed robbery, so the first method of committing involuntary manslaughter was not established.[4] Defendant did not contend that he negligently performed a lawful act or that he negligently omitted to perform a legal duty. Accordingly, defendant failed to establish that an instruction on involuntary manslaughter was proper.[5]

Moreover, because the jury did not acquit defendant, we are not persuaded that a rational view of the evidence supported an involuntary manslaughter instruction. Defendant was charged and convicted of first-degree felony murder. The jury was also instructed on, but rejected, the lesser offense of second-degree murder. Therefore, "[t]he jury's rejection of second-degree murder in favor of first-degree murder reflected an unwillingness to convict of a lesser included offense such as manslaughter." *People v Raper*, 222 Mich App 475, 483; 563 NW2d 709

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[2] The court reporter did not transcribe the audiotape of defendant's statement that was played for the jury. Defendant has not provided us a copy of the transcript of his statement that was provided to the jury. Accordingly, defendant has not provided us with a material document that is essential to our resolution of this issue. See MCR 7.212(C)(7). However, rather than requiring defendant to file a supplemental brief or striking his brief, MCR 7.212(I), we will instead consider this issue by relying on defendant's description of his statement.

[3] Defendant contends that the involuntary manslaughter definition given in *Mendoza* is a dictum. However, that definition has consistently been used by our Supreme Court. See *People v Ryczek*, 224 Mich 106, 110; 194 NW 609 (1923); *People v Townes*, 391 Mich 578, 590-591; 218 NW2d 136 (1974); *People v Richardson*, 409 Mich 126, 135-136; 293 NW2d 332 (1980); *People v Beach*, 429 Mich 450, 477; 418 NW2d 861 (1988).

[4] In *Beach, supra* at 477, our Supreme Court agreed with this Court's conclusion that defendant Edwards could not properly have been convicted of involuntary manslaughter because the conduct involved a felony, arson of a dwelling house.

[5] On appeal, defendant claims that his statements to the police established that the discharge of the weapon was an accident. The claim of accident negates the element of specific intent and, if established, results in a determination that a defendant is not guilty. CJI2d 7.3a. Defendant did not advance this theory at trial in either his opening statement or closing argument and did not request an instruction on accident. In these circumstances, we reject defendant's belated reliance on a claim that the weapon discharged accidentally.

(1997), citing *People v Zak*, 184 Mich App 1, 16; 547 NW2d 59 (1990). Thus, even if the trial court erred by failing to give the requested involuntary manslaughter instruction, any error was harmless. Consequently, we reject defendant's contention of instructional error.

Defendant also contends that he was deprived of his constitutional right to effective assistance of counsel. Because defendant did not request a new trial or an evidentiary hearing on this issue, our review is limited to the facts on the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). A successful claim of ineffective assistance of counsel requires a defendant to "show that counsel's performance was deficient and that there is a reasonable probability that, but for the deficiency, the factfinder would not have convicted the defendant." *Id*. at 423-424.

Specifically, defendant contends that trial counsel was ineffective for failing to move for a mistrial after the victim's girlfriend made inflammatory statements that prejudiced defendant's ability to receive a fair trial. Indeed, we are somewhat troubled by the victim's girlfriend's unresponsive commentary. At the same time, however, her courtroom demeanor may very well have had a negative impact on her credibility. The record suggests that she resorted to these inflammatory comments when trial counsel was about to successfully impeach her testimony or ask her a question that she was hesitant to answer. Her reluctance to testify negatively may have raised some doubt regarding her veracity. Moreover, trial counsel was rather successful in focusing on these inconsistencies. Trial counsel may have concluded that the successful impeachment and the witness's strained efforts to avoid answering harmful questions offset the potential for prejudice. Accordingly, we are not persuaded that defendant has successfully established that trial counsel was deficient or that, but for the deficiency, a different result probably would have occurred. *Snider, supra* at 423-424.

Affirmed.

/s/ Michael J. Talbot
/s/ Donald S. Owens
/s/ Karen M. Fort Hood